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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REPLY TO MOTION TO AFFIRM

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STATEMENT

This action was commenced in the district court to set aside an order of the Interstate Commerce Commission deciding that although the certificate of authority pur-

chased by appellant from another carrier, with the Commission's approval, gave the right to perform for-hire operations "to and from" certain specified points, such movements are to be restricted to westbound traffic only. The three-judge statutory court entered a final judgment dismissing the complaint and this is a direct appeal therefrom.

Pursuant to Rule 16, paragraph 1(e), of the Rules of this Court, appellees have moved to affirm the judgment of the district court.

At pages 1-3 of their motion appellees describe the nature of the controversy. No criticism is offered with respect to appellant's statement thereof, as found at pages 4-7 of its Jurisdictional Statement. Actually, throughout the controversy there has been no disagreement among the parties as to the facts. In this same connection it also should be pointed out that the district court's opinion (J. St. 34 *et seq.*) properly states the facts.

ARGUMENT

In support of its motion appellees advance the following propositions: (1) The Commission's construction of the meaning of words in a certificate of operating authority must stand "unless clearly erroneous." (2) The construction of the words involved here is not clearly erroneous. (3) In any event, appellee, by virtue of having consummated the purchase transaction following the Commission's decision as to the westbound restriction in controversy, is estopped from complaining. These points will be discussed in the order named.

The Power of the Courts

Appellant does not controvert the claims made by appellees in their motion (pages 2-3) that, as a general proposition, the Commission's construction of the meaning of words in operating certificates is controlling "unless clearly erroneous." The reason for the rule lies in the supposed expertise of the Commission in the premises. On the other hand, it is submitted by appellant that where, as in the instant case, the Commission undertakes to construe such common everyday words as are involved here, no "expert" knowledge is involved; and, if the interpretation of the Commission is in derogation of the commonly understood meaning of such words, the Commission's action should not be afforded any special sanctity.

The Commission's Interpretation Is Not Reasonable

At pages 4-5 of their motion appellees say the Commission's interpretation of the rights involved here is reasonable and not clearly erroneous.

For ready reference the portion of the operating rights purchased by appellant here in dispute is set out below (J. St. 4-5):

> "General Commodities * * *, over regular routes, From Chicago, Ill., to Hastings, Nebr., as follows:
>
> * * *
>
> Return, with no transportation for compensation *except its otherwise authorized* over these routes to Chicago.
>
> Service *is* authorized *to and from* the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa and Omaha, Lincoln,

and Fairmont, Nebr., and the off route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr." (Emphasis added.)

The Commission construed the above quoted phrase "to and from" to mean with respect "to westbound traffic only." (J. St. 2930) In other words, the Commission decided that the phrase "to and from" means the same thing as if *only* the word "to" appeared. Or, to look at it a different way, the interpretation placed upon the certificate by the Commission is as if the certificate read "Service is authorized *westward* to and from the intermediate points * * * and off-route points * * *." In order to reach a rational conclusion that only a one-way movement in connection with the disputed points was accorded by the certificate, the Commission necessarily either had to eliminate from the certificate the words "and from" or add to it the word "westward." The Commission lacks the power to do either. Its interpretation clearly is erroneous.

In further support of its claim that the Commission's interpretation has no foundation, appellant, at pages 8-9 of its Jurisdictional Statement, emphasized by the use of italics the phrase "except as otherwise authorized," as found in the certificate. In its motion (p. 4), appellees say such reliance is misplaced. The point made by appellant is this: The certificate which appellant purchased provides for one-way transportation of general commodities "From Chicago, Ill., to Hastings, Nebr."[1] It then says, "Return, with no transportation for compensation, *except otherwise provided*, over these routes to Chicago." Immediately following these words the certificate says: "Service *is* authorized to and from" the intermediate and off-route points set out in the instrument. Thus, construed in proper context, the certificate clearly indicates, by the use of the phrase "except as

[1] About which there is no controversy.

otherwise authorized," that while there is to be no return eastwardly for compensation from Hastings, Nebraska, to Chicago, nevertheless an exception is to be carved out. That exception is then created in the very next sentence: "Service authorized *to and from*" the described intermediate and off route points.

It is claimed by appellees that appellant's reliance upon the italicized words in the sentence, "Return, with no transportation for compensation *except as otherwise authorized*, over these routes to Chicago," is "misplaced" for this reason: Appellee's claim (motion, p. 4) that since the certificate provides only a one way grant of authority from Chicago to Hastings, the reason for the reference to a return movement is to enable appellant to get its empty vehicles back to Chicago after deliveries to Hastings, Nebraska. It is said by appellees that Commission authority is required for the movement of empty vehicle equipment over the highways. Appellees cite three Commission decisions in a footnote (p. 4) in support of the proposition.

An examination of these decisions, however, shows they are not in point here. All of them disclose that Commission authority to move empty vehicle equipment was being sought between points which the applicant carriers *had not been certificated to serve*. None of these cases involved the question of whether a carrier, having been authorized to perform a one way movement, could return its empty equipment to the point of origin as a matter of right.

Appellant knows of no decision holding that a carrier must have authority to return its empty vehicle equipment to the point of origin.

Furthermore, the Commission's own Rules are at odds with the position appellees are taking in their motion. Under the so-called Deviation Rules of the Commission it

is declared that a carrier may, as a matter of right, deadhead its empty vehicles over the highways between any two points incidental to either a prior or subsequent transportation in interstate commerce.[2] In the case at bar it is inconceivable that the Commission rightly could take the position that, having authorized appellant to make for-hire movements from Chicago to Hastings, appellant nevertheless could not return its empty vehicles from Hastings to Chicago without obtaining additional authority.

Especially since the disputed words in the certificate are non-technical, the interpretation placed upon the certificate by men in the industry is entitled to serious consideration. The decision of the Commission shows on its face (J. St. 29-30) that "for a number of years *eastbound* service" from the intermediate and off-route points had been performed under the certificate by the lessees of the original holder, Smith (who sold to appellant); that, likewise, under temporary authority, appellant performed such eastbound movements; that "all the carriers operating under these rights" have construed the certificate *as authorizing two-way service between all points permitted to be served*, except that a return movement may not be performed from Hastings; and that even the *opposition carriers* who were opposing appellant's application were of the opinion that *eastbound* movements were authorized by the certificate. (Quotation in italics ours)

Applicant submits there is nothing ambiguous about the

[2] The text of the rule is as follows:

"(9) *Deadheading empty vehicles.* A motor carrier may deadhead empty vehicles over any highway use of which is necessary or desirable to accomplish a reasonably direct and practicable movement thereof between any two points incidental to either prior or subsequent transportation in interstate or foreign commerce subject to the Interstate Commerce Act." Code of Fed. Regulations, Title 49 Transportation Part 211 Scope of Operating Authority; Routes, Sec. 211.1(9); Fed Carriers Reports, par. 3578)

certificate, and that the Commission's decision is arbitrary and plainly erroneous.

There is no Estoppel

Lastly, it is asserted by appellees (motion, p. 5) that appellant is estopped from attacking the Commission's decision, even if it is erroneous. According to appellees, appellant is barred because it invoked the authority of the Commission to gain approval of the purchase transaction, and then later accepted the certificate knowing the Commission interpreted it as authorizing only westbound movements. In support appellees cite *Callanan Road Co. v. United States*, 345 U. S. 507, and then go on to say:

> "The appellant therefore 'accepted the transfer with the limitations contained in the certificate' and 'now will not be heard to say it is entitled to receive more than its transferor had.' 345 U. S. at 513."

In the next sentence appellees maintain that the *Callanan* Case is not distinguishable from the case at bar, and that the district court was wrong in holding otherwise. As the district court pointed out in its opinion herein, in the *Callanan* Case the facts show an attempted collateral attack, but in the present case a *direct* attack is made. The district court gave careful consideration to the question. It said (J. St. 37-38):

> "At the outset, we are faced with defendants' first defense, namely, that the complaint fails to state a cause of action upon which relief can be granted. After due consideration we are of opinion that the decision in Callanan Road Co. v. United States, 345 U. S. 507, is not in point, factually. The decision in Callanan rests upon the particular fact situation there presented. One Hutton had been granted a 'grandfather clause' certificate of convenience and necessity as a common carrier by water between ports of call in designated areas. Thereafter, on its

own motion, the Commission issued to Hutton an amended certificate restricting his operating rights to freightage service only and excluding contract towage service. Hutton accepted the amended certificate without protest and continued operating thereunder until his death. After Hutton's death, Callanan purchased his operating rights by Commission authorization granted in 1947. Several years thereafter Callanan filed a petition requesting an interpretation of its 'Hutton rights' certificate permitting it to engage in towage service. The cause reached the Supreme Court in proceedings instituted by Callanan to review an order of the Commission interpreting the 'Hutton rights' certificate as permitting freightage service only. Upon this factual background, the Supreme Court held that the proceeding instituted by Callanan could not be maintained for the reason that it constituted a collateral attack upon the Commission order under which Hutton's certificate had been amended prior to the time of Callanan's purchase of the Hutton operating rights. The Court held further that Callanan having invoked the power of the Commission for approval of the transfer of the Hutton certificate, as amended, was estopped to deny the authority of the Commission to issue that certificate.

"In the instant cause there is no collateral attack and no similar factual basis for an estoppel. Plaintiff sought approval for the purchase of the certificate as originally granted to Smith. Amendment of the language of the certificate intervened in the case after the interpretive report issued by the Commission on June 23, 1952. Subsequent proceedings, including this cause, have been directed to review of that report and orders issued thereon. This is therefore a direct attack upon the Commission orders and not subject to the infirmities found to exist in the Callanan case."

The point which appellees seek to make (motion, p. 5), namely, that having accepted the certificate knowing of

the construction placed upon it by the Commission, appellant "now will not be heard to say it is entitled to more than its transferor had" (quoting from the *Callaghan* Decision), not only is factually inapplicable but it also helps to point up the distinctions between the present case and the *Callaghan* Decision. In the case at bar it is perfectly clear that appellant is *not* seeking to gain anything more than its transferor had. All appellant is trying to do is to get exactly what its transferor had and *nothing* more. The Commission concedes that all the carriers who were interested in the authority—vendor and his lessees, applicant and even the opposition carriers—believed the certificate permitted a two-way operation with respect to the subject intermediate and off-route points. Therefore when applicant and its vendor made the purchase contract, both sides considered that these two-way rights constituted part of the consideration to be paid for the certificate—part of the bargain. It logically follows that as things stand now appellant has received less, not more, than it bargained for. To rectify this wrong, appellant has pursued the only course open to it, short of abandoning the contract after the Commission's decision approving the purchase was handed down. Applicant sees no basis for estoppel on this record.

CONCLUSION

For the reasons hereinabove stated, applicant respectfully urges that appellees' motion to affirm should be overruled.

Respectfully submitted,

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